BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROGER D. BLASI Claimant v. **BLASI PRODUCTION CARE** Respondent and **TECHNOLOGY INSURANCE COMPANY** Insurance Carrier	))))))))))	Docket No. 1,072,166

ORDER

Claimant requests review of the September 16, 2015, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on January 21, 2016.

APPEARANCES

Robert A. Levy, of Garden City, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained a 25 percent whole body functional impairment as a result of his work injury on February 8, 2013, and awarded permanent partial disability benefits (PPD) based on that finding. The ALJ denied claimant's work disability claim. The ALJ found no physician testified claimant will need future medical treatment and denied claimant's claim for such treatment.

Claimant contends he is entitled to work disability and future medical treatment. Claimant argues he received no earnings from his current work, which he maintains is not a job. Claimant argues Dr. Hufford testified claimant may need future foot drop surgery. Claimant requests the Board reverse the ALJ's decision and award him work disability and future medical treatment.

Respondent contends claimant failed to prove he suffered a wage loss, failed to prove he is entitled to work disability, and failed to demonstrate he is entitled to future medical treatment. Respondent requests the Board affirm the ALJ's Award.

The issues are:

1. Is claimant entitled to PPD based on a work disability?[1]

2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant was a contract pumper and welder. His duties included maintenance of oil and gas wells and writing in production logs. He had a welding shop where he repaired and manufactured equipment, mainly for the oil fields. Claimant testified his job required driving 100 to 150 miles per day.

Claimant's business was an unincorporated "family business"[2] he and his wife operated for 35 years. Claimant's wife did the bookkeeping and claimant performed the physical aspects of the business and making bids to customers.

On February 8, 2013, claimant injured his low back while twisting and picking up an 18 inch pipe collar weighing around 70 pounds. The compensability of his claim was admitted.[3] Claimant initially received chiropractic treatment, then consulted his primary care physician, who referred him to a back specialist, Dr. Loathes, a neurosurgeon. Dr. Loathes performed low back surgery on multiple levels of claimant's lower back, including a fusion, removal of a vertebra, and placement of steel rods.

Following claimant's surgery, he developed left foot drop that impaired the function of his left foot and toes. An orthotic was prescribed, however, claimant testified the orthotic was very cumbersome and required a size 15 shoe to wear over it. According to claimant, his cowboy boots held his left foot up and he could walk better in the boot than the orthotic.

Claimant testified his back pain made it difficult to maintain his 80 acres of pasture land on which his residence was located. According to claimant, he had to get rid of his horses because he could not care for them properly.

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[1] The parties stipulated at oral argument that there is no dispute claimant sustained a 25 percent permanent functional impairment as a consequence of the accidental injury.

[2] R.H. Trans. at 26.

[3] *Id.* at 4-6.

After his injury, claimant helped a friend who was a rancher. Claimant drove a pickup and checked cattle from the vehicle. The rancher would not let claimant out of the pickup to work cattle. Claimant only drove and did not assist the rancher with anything else. Claimant received no wages. In return of his assistance, the rancher bought claimant's dinner. Claimant has engaged in no substantial gainful employment since his injury.

Claimant is 60 years old, graduated from high school, and has no computer experience or training. He attended two months of vocational training for automotive and tractor air conditioning.

David W. Hufford, M.D., a licensed occupational physician, evaluated claimant on June 23, 2014, at the request of respondent. Dr. Hufford took a history from claimant, reviewed medical records, and conducted a physical examination.

Dr. Hufford diagnosed claimant with left foot drop, a condition the doctor defined as a deficit in neurologic function of the leg, interfering with the holding of the ankle in dorsiflexion. Foot drop affects strength and limits performing many activities, such as standing on ladders and climbing stairs.

Dr. Hufford testified there was an experimental surgery available to treat foot drop,[4] but he did not recommend it. The doctor testified he would defer to a lower extremity specialist regarding the advisability of that treatment. Claimant testified he continued to take hydrocodone, a prescription pain medication. Dr. Hufford's report indicated claimant was taking naproxen and had recently been prescribed Gabapentin for residual pain.

Dr. Hufford placed claimant in the light duty category of the Dictionary of Occupational Titles, and restricted claimant from lifting over 10 pounds frequently and 20 pounds occasionally, with no more than occasional bending at the waist, twisting and turning of the trunk. Future work should be performed at ground level, with avoidance of uneven terrain.

Dick Santner performed a vocational evaluation at the request of claimant's counsel on February 20, 2015. He reviewed records, interviewed claimant and prepared a task list.

Dr. Hufford reviewed the task list prepared by vocational consultant Dick Santner, who identified nine work tasks claimant performed in the five years preceding his accidental injury. Dr. Hufford opined claimant can no longer perform six tasks, for a 67 percent task loss.

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[4] According to Dr. Hufford's report, the surgery involves a transfer of the posterior tibial tendon.

Claimant was not working at the time Mr. Santner interviewed him. Mr. Santner opined that with Dr. Hufford's restrictions, employment was available, consisting of delivering cars for Hertz, which paid no more than $8.50 per hour for 29 hours per week. Mr. Santner did not know if such employment was, or would be, still available.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b states in part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-510h provides in relevant part:

> (e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2012 Supp. 44-510e(a)(2), in part, states:

> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is

> equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
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> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
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> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
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> (D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.
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> (E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[5]

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

WORK DISABILITY

The Board finds claimant is entitled to PPD based on a 69 percent work disability, for the following reasons:

1. There is no dispute claimant sustained a 25 percent whole body functional impairment, well in excess of the functional impairment required by the statute to render claimant eligible to receive work disability in excess of his functional impairment.

2. The undisputed evidence establishes claimant experienced a wage loss and a loss of wage earning capability exceeding 10 percent, and such wage loss is directly attributable to his injury. The testimony of claimant and the only vocational expert to testify, Dick Santner, support that finding.

3. There is only one relevant task loss opinion in the record, which was expressed by Dr. Hufford, who reviewed the only list of work tasks in the record, prepared by Mr. Santner. Mr. Santner identified nine work tasks claimant performed in the five year period preceding his injury, and Dr. Hufford, the only physician to testify, opined claimant could not perform six, for a task loss of 67 percent.

4. The evidence in this record, which is uncontradicted, establishes claimant's wage loss was directly attributable to his work injury. No other cause for his wage loss was established. The only evidence regarding claimant's residual wage earning capacity is from Mr. Santner, who identified one position claimant could perform in the open labor market. That position required delivering cars on a part-time basis, for up to 29 hours per week, paying a maximum of $8.50 per hour. That job could therefore pay no more than $246.50 ($8.50 times 29 hours) a week, compared to claimant's pre-injury average weekly wage, which the parties stipulated was $854.73. Claimant sustained a 71 percent wage loss.

5. Claimant's activity assisting a neighbor is not "post-injury employment for wages." In return for such assistance, his neighbor bought dinner for claimant, but no wages were paid.

6. Respondent argues that in assessing claimant's loss of wage earning capability, Mr. Santner impermissibly considered claimant's age and left foot drop as factors bearing on his ability to access the open labor market. The Board disagrees. It was proper and appropriate for Mr. Santner to consider those factors, and his doing so does not detract from his credibility. The statute requires all factors be considered in determining an employee's loss of wage earning capability, and the record establishes Mr. Santner did so in evaluating such capability.

Averaging claimant's 67 percent task loss and 71 percent wage loss results in 69 percent work disability, and the ALJ's decision is modified to award PPD based on that finding.

FUTURE MEDICAL

The focus of the parties' arguments is the availability of a surgical procedure to treat claimant's foot drop. The possibility of that surgery, in and of itself, may not support an award of future medical. However, claimant continues to receive treatment for his injury. Dr. Hufford's report indicated claimant took naproxen, on a prn basis, and was recently placed on Gabapentin for residual pain. Claimant testified he takes hydrocodone. All three of those medications are available only with a prescription, and claimant apparently receives such prescriptions from his primary care doctor.

Claimant overcame the presumption that when he reached MMI, respondent's obligation to provide further medical treatment terminated. Medical evidence from Dr. Hufford, in combination with claimant's testimony, established claimant will probably require additional treatment after he reached MMI. Claimant is therefore entitled to an award of future treatment upon application to and approval by the ALJ.

CONCLUSIONS

1. Claimant is entitled to PPD based on a 69 percent work disability.

2. Claimant is entitled to future medical treatment upon application to and approval by the ALJ.

AWARD

WHEREFORE, the Board finds that the Award of Administrative Law Judge Thomas Klein, dated September 16, 2015, is reversed as specified in this Order.

Claimant is entitled to 43.20 weeks of temporary total disability compensation at the rate of $569.85 per week or $24,617.52 followed by permanent partial disability compensation at the rate of $569.85 per week not to exceed $130,000.00 for a 69% work disability.

As of March 23, 2016 there would be due and owing to the claimant 43.20 weeks of temporary total disability benefits at the weekly rate of $569.85, or $24,617.52, plus 119.51 weeks of permanent partial disability benefits at the weekly rate of $569.85 or $68,102.77, for a total due and owing of $92,720.29, which is ordered paid in one lump sum less amounts previously paid. Thereafter, respondent is ordered to pay claimant the remaining balance of permanent partial disability benefits in the amount of $37,279.71 at

the rate of $569.85 per week not to exceed the $130,000 statutory cap until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge